Public Prosecutor v Yap Min Woie

FEDERAL COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 06-6-95
ANUAR ZAINAL ABIDIN CJ, PEH SWEE CHIN AND MOHAMED DZAIDDIN FCJJ
9 NOVEMBER 1995

Criminal Procedure *— Juvenile — Appeal against sentence — Juvenile Court ordered detention of juvenile for three years in approved school — Whether High Court had discretion to shorten detention period — Juvenile Courts Act 1947 ss 12, 28(a) & 40*

Words and Phrases *— 'Shall' — Juvenile Courts Act 1947 ss 12 & 28*

On 9 December 1989, the respondent, a juvenile at the material time, was charged for robbery punishable under s 392 of the Penal Code (FMS Cap 45) at the Juvenile Court, Johor Bahru. The respondent pleaded guilty to the charge, and was ordered to be detained at an approved school, ie Tunas Bakti Reform School, Taiping, for a period of three years from the date of the order pursuant to s 12(f) of the Juvenile Courts Act 1947 ('the Act'). The respondent appealed against the said order in the High Court. On 19 December 1990, the High Court judge allowed the appeal and reduced the period of detention from three years to one year. The appellant appealed against the said decision. The question before this court was whether the judge was correct in law in reducing the period of detention which was ordered by the Juvenile Court earlier.

Held, allowing the appeal:

(1) Under s 28 of the Act, the High Court judge is neither empowered nor has the discretion to shorten the period of detention. The power to order a juvenile to be sent to an approved school is bestowed under the Act to the Juvenile Court, and that order shall be an authority for the respondent's detention for a period of three years. Further, it is stipulated under s 28(a) of the Act that only the board of visitors of the approved school to which the respondent was sent may in their absolute discretion shorten the period of detention (see p 172E–F).

(2) After considering the powers of the Juvenile Court under the Act and the powers of the Juvenile Court conferred on the High Court by virtue of s 40 of the Act and particularly to the scope of s 28 and proviso (a) thereto pertaining to the discretion given by the legislature to the board of visitors, it can be concluded that the word 'shall' as appearing in ss 12 and 28 of the Act means mandatory. Therefore, under s 28, the detention of three years made by the Juvenile Court is mandatory, and it cannot be varied by the appellate court (see p 173B–C).

[Bahasa Malaysia summary

Pada 9 Disember 1989, penentang, seorang juvenil pada masa material, telah dipertuduhkan dengan kesalahan merompak yang boleh disabitkan di bawah s 392 dalam Kanun Keseksaan (NMB Bab 45) di Mahkamah Juvenil di Johor Bahru. Penentang mengaku bersalah terhadap pertuduhan tersebut, dan dia telah diperintahkan supaya ditahan di sebuah sekolah yang diluluskan, iaitu Sekolah Pemulihan Tunas Bakti, Taiping, untuk tempoh tiga tahun dari tarikh perintah menurut s 12(f) Akta Mahkamah Juvana 1947 ('Akta tersebut'). Penentang merayu terhadap perintah tersebut di Mahkamah Tinggi. Pada 19 Disember 1990, hakim Mahkamah Tinggi telah membenarkan rayuan itu dan mengurangkan tempoh tahanan daripada tiga tahun kepada satu tahun. Perayu telah merayu terhadap keputusan tersebut. Soalan yang harus pertimbangkan oleh mahkamah ialah sama ada hakim tersebut adalah betul dari segi undang-undang dalam mengurangkan tempoh tahanan daripada apa yang diperintahkan oleh Mahkamah Juvana terlebih dahulu.

Diputuskan, membenarkan rayuan itu:

(1) Di bawah s 28 Akta tersebut, hakim Mahkamah Tinngi tidak diberi kuasa atau mempunyai budi bicara untuk mengurangkan tempoh tahanan. Kuasa untuk memerintahkan seorang juvenil untuk dihantar ke sekolah yang diluluskan adalah diberikan di bawah Akta tersebut kepada Mahkamah Juvana, dan perintah tersebut ialah autoriti untuk menahan penentang untuk tempoh selama tiga tahun. Lagipun, di bawah s 28(a) Akta tersebut, adalah diperuntukkan bahawa hanya lembaga pelawat sekolah yang telah diluluskan itu yang penentang telah dihantar boleh, mengikut budi bicara mutlak mereka, memendekkan tempoh tahanan (lihat ms 172E–F).

(2) Selepas mempertimbangkan kuasa-kuasa Mahkamah Juvana di bawah Akta tersebut dan kuasa-kuasa Mahkamah Juvana yang dikurniakan kepada Mahkamah Tinggi seperti yang diperuntukkan di bawah s 40 Akta tersebut, terutamanya terhadap skop s 28 dan proviso (a) di bawahnya berkenaan dengan budi bicara yang diberikan oleh badan perundangan kepada lembaga pelawat, boleh disimpulkan bahawa perkataan 'hendaklah' yang muncul di dalam ss 12 and 28 Akta tersebut bermakna mandatori. Maka di bawah s 28, tahanan bagi tempoh tiga tahun yang dibuat oleh Mahkamah Juvana adalah mandatori, dan tidak boleh diubah oleh mahkamah rayuan (lihat ms 173C).]

Notes

For cases on juvenile court, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1656–1659.

Cases referred to

Howard v Bodington (1877) 2 PD 203
Liverpool Borough Bank v Turner (1861) 30 LJ Ch 379
Pow Hing & Anor v Registrar of Titles, Malacca [1981] 1 MLJ 155

Legislation referred to

Courts of Judicature Act 1964 s 66(1)
Juvenile Courts Act 1947 ss 12, 28, 40, Part II
Penal Code (FMS Cap 45) s 392

Appeal from: Criminal Appeal No 51-84-89 (High Court, Johor Bahru)

Encik Azhar Mohamad (Deputy Public Prosecutor) for the appellant.
Respondent in person.

Mohamed Dzaiddin FCJ (delivering the judgment of the court): In this reference, the respondent, a juvenile at the material time, was charged for robbery, punishable under s 392 of the Penal Code (FMS Cap 45) at the Juvenile Court, Johor Bahru, on 9 December 1989. He pleaded guilty to the aforesaid charge and was ordered to be detained at the approved school, namely, Tunas Bakti Reform School, Taiping, for a period of three years from the date of the order. He appealed against the said order to the High Court judge, Johor Bahru. On 19 December 1990, his Lordship allowed the appeal and reduced the period of detention from three years to one year on the ground that he was a first offender who had pleaded guilty to the charge of robbery. Needless to say, the Pendakwa Raya was unhappy with the above decision. With leave of this court, the following question was referred to us under s 66(1) of the Courts of Judicature Act 1964:

> Whether, in view of s 28 of the Juvenile Courts Act 1947, it is right in law for the learned judge to reduce the period of detention of juvenile in the approved school as ordered by the juvenile court under s 12(1)(f) of the Act from a period of three years to one year ?

After hearing the learned deputy public prosecutor, Encik Azhar Mohamed, we answered the above question in the negative. Our reasons are as follows.

The jurisdiction and powers of the Juvenile Court are provided under Part II of the Juvenile Courts Act 1974 ('the Act'). The powers of the Court, on proof of an offence committed by a juvenile, clearly stated in s 12 of the Act. For the purpose of the present reference, sub-s (1) states:

(1) Where a Juvenile Court is satisfied that an offence has been proved, the Court *shall*, in addition to any other powers exercisable by virtue of this Act or any other law for the time being in force, have power —

...

(f) to order the offender to be sent to an approved school or Henry Gurney school;

Thus, having pleaded guilty to the charge of robbery, the Juvenile Court accordingly made an order that the respondent be sent to Sekolah Tunas Bakti, Taiping, for a period of three years in accordance with s 28 of the Act, which states:

> Where a Juvenile Court orders a juvenile to be sent to an approved school, the order *shall* be an authority for his detention therein for a period of three years or until he attains the age of fourteen years whichever is the longer:
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> Provided —
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> (a) that the Board of Visitors of the approved school to which the juvenile is sent may in their absolute discretion shorten the period of detention for reasons which appear to them to be sufficient or may release any such juvenile on licence for such period and upon conditions as they may deem fit to impose; and
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> (b) that no juvenile shall be released from an approved school during the first twelve months of the period of detention without the consent of the minister signified in writing.

The issue here is whether the High Court judge has the power or the discretion to reduce the period of detention from three years to one year. Our answer is that under s 28 of the Act, he is not empowered nor has he the discretion to shorten the period of detention. The power to order a juvenile to be sent to an approved school is bestowed under the Act to the Juvenile Court, and that order shall be an authority for the juvenile's detention for a period of three years. Under the proviso (a), it is further stipulated that only the board of visitors of the approved school to which the juvenile was sent, may in their absolute discretion, for reasons which appeared to them to be sufficient, shorten the period of detention.

Next, we have to consider whether the word 'shall' as appearing in ss 12 and 28 respectively is to be construed as mandatory or directory. It is clear to us that where a court tribunal is given in terms a power to exercise a certain jurisdiction, this may be construed as imposing a mandatory duty to act (*Bennion's Statutory Interpretation*, (2nd Ed) at p 31).

A question may be asked : How does the court distinguish between mandatory and directory duties? The answer is given by Lord Campbell in *Liverpool Borough Bank v Turner* (1860) 30 LJ Ch 379:

> No universal rule can be laid down ... it is the duty of the courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

In *Howard v Bodington* (1877) 2 PD 203 at p 211, which was followed by the Federal Court in *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155, Lord Penzance stated:

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance

A of the provision and the realtion of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.

Thus, our answer to the above question is that, having regard to the B powers of the Juvenile Court under the Act, and the powers of the Juvenile Court conferred on the High Court under s 40 of the Act, and particularly to the scope of s 28 and proviso (a) thereto pertaining to the discretion given by the Legislature to the board of visitors, it is our conclusion that the word 'shall' means mandatory and therefore under s 28, the order of C detention of three years made by the Juvenile Court is mandatory which cannot be varied by the appellate court. It is only the board of visitors of the said approved school which has the discretion to shorten the period.

Appeal allowed.

Reported by Hadmin Zahar Habib Muhamad

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